

Washington University Law Review

Volume 88 | Issue 3

January 2011

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Recommended Citation

Micah Zeller, *From Preservative to Transformative: Squaring Socioeconomic Rights with Liberty and the American Constitutional Framework*, 88 WASH. U. L. REV. 735 (2011).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol88/iss3/5

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FROM PRESERVATIVE TO TRANSFORMATIVE: SQUARING SOCIOECONOMIC RIGHTS WITH LIBERTY AND THE AMERICAN CONSTITUTIONAL FRAMEWORK

“[T]rue individual freedom cannot exist without economic security and independence. . . . We have accepted . . . a second Bill of Rights The right to a useful and remunerative job . . . The right to earn enough to provide adequate food and clothing and recreation . . . The right to adequate medical care”¹

—Franklin Roosevelt, 1944

“[T]hrough more and more rules and regulations and confiscatory taxes, the government was taking more of our money, more of our options, and more of our freedom.”²

—Ronald Reagan, 1989

“[T]he Constitution is a charter of negative liberties [I]t doesn’t say what the federal government or the state government must do on your behalf. . . . I’m not optimistic about bringing about major redistributive change through the courts. The institution just isn’t structured that way.”³

—Barack Obama, 2001

The U.S. Constitution is not designed to create legally enforceable socioeconomic rights. Despite growing consensus about the normative importance of judicial consideration of socioeconomic deprivation,⁴ in 200

1. President Franklin Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944).

2. President Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989).

3. Radio interview by WBEZ-FM with U.S. Senator Barack Obama, in Chicago, Ill. (Jan. 18, 2001).

4. Contemporary conceptions track this view in the U.S. and abroad. *See, e.g., Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR 1022 (CC) at para. 36 (S. Afr.) (“The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts[’s] . . . function in respect of socioeconomic rights is directed towards ensuring that legislative and other measures taken by the State are reasonable.”); President Barack Obama, Remarks on the Retirement of Supreme Court Justice David Souter (May 1, 2009) (describing the desired attributes of a Supreme Court nominee as the “quality of empathy, of understanding and identifying with people’s hopes and struggles” and the understanding that “[justice] is also about . . . whether [people] can make a living and care for their families.”).

years of expounding the Supreme Court has never recognized socioeconomic rights as constitutional rights. Theories abound for this continued quiescence.⁵ Accepted reasons include lack of explicit textual support,⁶ well-embedded conceptions of “negative” liberty, problems of justiciability, concerns about separation of powers, and difficulties with majoritarian approval. Yet, in the context of growing disparities in wealth⁷ and the perceived consequences of legislative failure to address inequality,⁸ jurists (and political philosophers) increasingly view the recognition of socioeconomic rights as both a practical necessity and moral imperative.⁹

This Note addresses the recognition of socioeconomic rights by U.S. federal courts.¹⁰ In this context, “socioeconomic rights” means

5. Whether this is failure, inability, or reluctance on the part of the Court depends on the constitutional principles with which one begins. For a political explanation, see CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 105–08 (2004) (arguing that changes to the composition of the Supreme Court beginning in the late 1960s—notably President Nixon’s four appointees—foreclosed the emerging possibility that the Court would recognize the constitutional status of social and economic rights); cf. R. Shep Melnick, *The Price of Rights*, IV CLAREMONT REV. BOOKS 26, 27 (2004) (reviewing CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004)) (calling Sunstein’s theory “politically convenient” and wondering why he does not mention that two important liberal justices, Black and Warren, also failed to “join the welfare rights bandwagon.”). For an explanation based on conceptual difficulties rooted in the dominant scholarship of the time, see Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 780 (2004) (arguing that methodological assumptions arising from legal process theory obscured the possibility of using judicial means to enforce social welfare rights).

6. The Constitution, of course, has not been amended to include socioeconomic rights. It is possible to adduce why this is the case under discrete analysis. See, e.g., William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001) (arguing that the Civil Rights Movement redirected political attention from progress toward constitutional inclusion of socioeconomic rights that began in the 1930s). This Note does not take such an approach. See *infra* note 10.

7. In the United States from 1997 to 2001, the top one percent captured far more of the real national gain in wage and salary income than did the bottom fifty percent. Clive Crook, *The Height of Inequality*, ATL. MONTHLY, Sept. 2006, at 36, 37. This trend continues. See generally Timothy Noah, *The Great Divergence: What’s Causing America’s Growing Income Inequality?*, SLATE, Sept. 3, 2010, <http://www.slate.com/id/2266025/entry/2266026/>.

8. See, e.g., Robert Reich, *Unjust Spoils*, NATION, July 19, 2010, at 13 (arguing that income inequality caused the 2008 U.S. recession).

9. E.g., THOMAS POGGE, *WORLD POVERTY & HUMAN RIGHTS* 97–107 (2d ed. 2008); Antonio Carlos Pereira-Menaut, *Against Positive Rights*, 22 VAL. U. L. REV. 359, 365 (1988) (“[S]ocial and economic rights are intended precisely to remedy these deep causes of inequality, uncared for by the classical negative rights and liberties.”).

10. This Note does not address legislative attempts to entrench socioeconomic rights in state law or attempts to do so by state courts. For an argument in favor of this approach, see Helen Herschkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132 (1999) (arguing that because state judges frequently are elected, implementation of socioeconomic rights in state constitutions is less problematic than at the national level). Commentators generally agree that, in the present environment, it is unworkable to amend the U.S. Constitution to include socioeconomic rights. See, e.g., Rosalind Dixon, *Creating Dialogue About*

“subsistence rights.” The former may refer to a broader set of rights, like the right to equally accessible higher education.¹¹ The latter is more limited and refers to rights to the basic goods necessary to gain livelihood. Constitutional rights to subsistence, for example, may include the right to adequate food and water, the right to shelter, or the right to “survival income.”¹² This Note considers the context in which these rights arise, what they are intended to address, and how their justification and implementation differ from that of existing constitutional rights.¹³ Though

Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited, 5 INT’L J. CONST. L. 391, 407–08 (2007) (arguing amendment is unworkable because of inherent procedural difficulty, notably Article V’s demanding and inflexible two-thirds majority ratification requirement); Gregory Alexander, *Why Are There No Socioeconomic Rights in the American Constitution?* 24 (Sept. 20, 2004) (unpublished manuscript) (on file with the Stellenbosch Institute for Advanced Study), available at http://academic.sun.ac.za/stias/projects/7_social_econ_justice/documents/abstracts/greg_alexander.pdf (arguing that amendment is unworkable because of the countermajoritarian problems associated with removing a right “from the realm of ordinary politics”). *But see* SUNSTEIN, *supra* note 5, at 179–82 (contending that constitutional amendment is plausible if conceived and directed to address specific national problems).

11. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights art. 13(2)(c), Jan. 3, 1976, 993 U.N.T.S. 3.

12. *See* Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 3 (1987) (defining constitutional obligation to assure “survival” beyond the literal sense and as more generous than a bed in a homeless shelter and meals at a soup kitchen). In this sense, and for the purposes of this Note, the term socioeconomic rights is not meant to include “economic liberty” of the sort advocated by economic libertarians. That said, there was exceptional agreement among progressive liberals and classic libertarians that the Supreme Court should have revived the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. *See* Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) [hereinafter Professors’ Brief] (signed by Jack M. Balkin and Randy E. Barnett, among others). It stands to reason, of course, that Professors Balkin and Barnett harbored different hopes for the ultimate implications of a ruling in favor of the position they supported. For a discussion of the consequences of a renewed Privileges or Immunities Clause on socioeconomic rights, see *infra* Part IV.A and accompanying text.

13. Terminological disagreement exists on what constitutes a constitutional “right.” Generally speaking, a right is a “constitutionally recognized, judicially enforceable restraint on popular government.” Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 860 (2001). But the definition may also depend on the nature of its holder, *see* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 91 (1978) (distinguishing political rights defined as individual political aims from nonindividuated political aims intended to produce some overall benefit), or on the context in which it is invoked, *see* Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 886 (1989) (defining constitutional rights as “political abstractions” invoked “to trump unacceptable democratic outcomes” when we “suspect that democracy is not likely to operate with tolerable fairness”). Rights may also be defined based on actions of a third party. *See* STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 17 (1999) (describing the transformation of an interest to a right “when an effective legal system treats it as such by using collective resources to defend it”). Lastly, the definition of a “right” may depend on its perceived justiciability. *Compare* Pereira-Menaut, *supra* note 9, at 370 (“If a claim . . . cannot be defined and enforced in a court of law . . . then it is not a real right.”), *with* Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1898 (2004) (describing how a constitution can enumerate socioeconomic rights but exempt them from judicial enforcement).

there is reason to believe that such rights lurk below the constitutional surface, that textual keys to unlock them exist, and that their recognition would be politically popular,¹⁴ federal courts remain unlikely venues for their constitutionalization.

That said, a revitalization of the Fourteenth Amendment's Privileges or Immunities Clause,¹⁵ augured by its recent reexamination before the Court in *McDonald v. City of Chicago*,¹⁶ offers the most feasible analytic framework for judicial implementation of enforceable socioeconomic rights.¹⁷

14. Distinctive features of constitutional jurisprudence are relevant not only to the recognition of additional socioeconomic rights, but also to those seeking to exercise their existing rights in order to limit government expansion. See generally SETH LIPSKY, *THE CITIZEN'S CONSTITUTION: AN ANNOTATED GUIDE* (2009) (annotating each clause of the Constitution, from the perspective of a nonlegal professional, as an exercise to inform ordinary citizens about constitutional limits to the enumerated powers of the executive, legislative, and judicial branches of government).

15. Following its demise in *The Slaughter-House Cases*, 83 U.S. 36 (1872), the Privileges or Immunities Clause sat relatively dormant until 1999, when the Supreme Court invoked the "right to travel" to invalidate a California law that limited new state residents to the lower level of welfare payments they had received in the state in which they previously resided. See *Saenz v. Roe*, 526 U.S. 489, 501–05 (1999).

16. 130 S. Ct. 3020 (2010). In *McDonald*, the Court had a remarkable opportunity to revisit the Clause and its consequences. The question was whether the right to keep and bear arms is incorporated against the states through the Due Process Clause (as all incorporated Bill of Rights provisions have been) or through the Privileges or Immunities Clause. In a five–four plurality opinion handed down in June 2010, the Court reached the expected result, albeit not through the (academically) preferred means.

17. Commentators within the same side of the political aisle were divided on the possible implications of the Court's ruling in *McDonald*. Progressive constitutionalists advocated a return to a "proper" understanding of the Fourteenth Amendment: a transformative, "truly reconstructive" document, intended to spur government action to eliminate socioeconomic stratification. See, e.g., Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in *THE CONSTITUTION IN 2020*, at 93–95 (Jack M. Balkin & Reva B. Siegel eds., 2009); see also Jess Bravin, *Rethinking Original Intent*, WALL ST. J., Mar. 14, 2009, at W3 (quoting Akhil Reed Amar as stating that "[t]he framers of the 14th Amendment were radical redistributionists"). Economic libertarians also sought to overturn *Slaughter-House*, perhaps as a means to attack the modern regulatory state. E.g., Brief Amicus Curiae of Cato Institute and Pacific Legal Foundation in Support of Petitioners, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521). Some commentators foresaw a revival of the Clause, but limited ramifications thereof. E.g., Ilya Shapiro & Josh Blackman, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms To The States*, 8 GEO. J.L. & PUB. POL'Y 1 (2010) (arguing that though it is likely the Privileges or Immunities Clause will at some point be welcomed back into modern constitutional jurisprudence, it cannot be manipulated to constitutionalize modern, positive rights). Others feared the possibilities for which a reconfiguration might lay the groundwork. See, e.g., Richard A. Epstein, *Undoing Limited Government: Positive Rights Under the 14th Amendment?*, FORBES, Mar. 31, 2009, <http://www.forbes.com/2009/03/30/fourteenth-amendment-rights-opinions-columnists-government.html> (warning that to overread the Fourteenth Amendment creates an open invitation for government expansion and that an improper revitalization of the Privileges or Immunities Clause may "convert[] a charter of negative liberty into a source of positive rights"). The implications of a "reshaped" Privileges or Immunities Clause on judicial recognition of socioeconomic rights are discussed below. See *infra* Part IV.A.

Part I of this Note considers the conceptual distinction between positive and negative rights, and the first constitutional articulations of socioeconomic rights. Part II examines the perceived problems with socioeconomic rights' justiciability. Part III explains characteristics of the American constitutional framework that render it unreceptive to the recognition of socioeconomic rights. Finally, Part IV describes how a revived Privileges or Immunities Clause may lead to the recognition of socioeconomic rights.

I. PHILOSOPHICAL AND HISTORICAL ORIGINS OF SOCIOECONOMIC RIGHTS

A. *Conceptual Distinction Between Positive and Negative Rights*

A "negative" right restricts government interference. A "positive" right compels government action. The distinction draws upon Isaiah Berlin's division of negative and positive liberty: the right to be left alone versus the right to self-determination.¹⁸ But this distinction operates generally.¹⁹ Even the most fundamental negative rights have positive aspects: protection of private property, for example, requires state-funded police protection.²⁰ Despite blurred theoretical differences between the two, and despite the difficulty in extracting utility in such distinctions from historical circumstances,²¹ rights can be classified with little intuitive difficulty as generally positive or generally negative.²² The U.S.

18. See Cross, *supra* note 13, at 863 (citing ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958)).

19. See, e.g., HENRY SHUE, BASIC RIGHTS 155 (2d ed. 1996) ("If one looks concretely at specific rights and the particular arrangements that it takes to defend or fulfill them, it always turns out in concrete cases to involve a mixed bag of actions and omissions.").

20. As another example, consider the Equal Protection Clause of the Fourteenth Amendment. The language of the Clause expresses freedom *from* certain government actions. U.S. CONST. amend. XIV, § 1 (protecting individuals against state law that would "deny to any person within its jurisdiction the equal protection of the laws"). But as one important case shows, any right may compel positive government action. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (requiring state resource expenditure to desegregate "separate but equal" educational facilities).

21. See *infra* note 34 for discussion of positive-negative distinctions as outgrowth of competing Cold War ideologies.

22. See HOLMES & SUNSTEIN, *supra* note 13, at 39 (conceding that, in practice, "a distinction is routinely drawn between negative rights and positive rights"). Yet, viewed from a sufficiently broad theoretical level, distinctions between rights converge in the nature of their enforcement. This truism echoes Jeremy Bentham and James Madison. See JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 206 (J.H. Burns, H.L.A. Hart & F. Rosen eds., 1996) ("Without law there is not property, and without property there is no law."); James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), in JAMES MADISON, WRITINGS (Jack N. Rakove ed., 1999) ("The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right.").

Constitution—conventionally viewed—is a “charter of negative rather than positive liberties.”²³ Moreover, because socioeconomic rights imply some duty to action on the part of the state and are expressed in terms of a right *to* some level of existence or goods, they are generally characterized as “positive.”²⁴

B. First Articulations of Socioeconomic Rights

All constitutions are products of the political circumstances in which they are drafted.²⁵ Social and economic rights first appeared in European constitutions in the early twentieth century.²⁶ But the view that citizens may claim certain entitlements from their government was not new.²⁷ Over the nineteenth century, changes in industrial conditions, social structures, and political values raised concerns that traditional rights and liberties

23. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983); *see also* Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330 (1985) (“[R]ights tend to be individual, alienable, and negative. . . . [Rights] belong to persons as individuals. . . . [Rights] impose on government only a duty to refrain from certain injurious actions, rather than an affirmative obligation to direct energy or resources to meet another’s needs.”). Judge Posner’s expression in *Joliet*, however, has been criticized for failing to take into account that many “negative” constitutional provisions contain elements of “positive” rights. *See, e.g.*, HOLMES & SUNSTEIN, *supra* note 13, at 43. But generally speaking, even advocates for judicial recognition of positive constitutional rights accept theoretical and practical distinctions between the two. *See* Cross, *supra* note 13, at 866; *cf.* Gerald C. MacCallum Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967) (challenging the idea that distinctions between positive and negative rights can be made as an abstract, theoretical matter).

24. Pereira-Menaut, *supra* note 9, at 361; *cf.* David Robertson, *Thick Constitutional Readings: When Classic Distinctions Are Irrelevant*, 35 GA. J. INT’L & COMP. L. 277, 278 (2007) (“Equating positive rights with socioeconomic rights is an oversimplification because the right to police protection . . . or the right to intervention by a welfare agency when one’s father is a dangerous drunk are positive rights, but not in any simple sense socioeconomic.”). For a discussion of the adjudication of a case factually similar to the latter, *see infra* note 64.

25. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1266 (1993) (describing words in a constitution as its drafters’ “language,” which embodies their ideals, hopes, prejudices, and enlightenments). The final content of a constitution also reflects some degree of compromise among competing interests, the composition of which is very likely to be different at the time of drafting than it would be today. *See* R. George Wright, *Originalism and the Problem of Fundamental Fairness*, 91 MARQ. L. REV. 687, 702 (2007) (“[M]any of those persons who were excluded from direct influence on the Founders’ Constitution, or on the Civil War amendments, would have been sympathetic to some culturally appropriate minimal floor of economic provision as a matter of last resort.”).

26. *See, e.g.*, VERFASSUNG DES DEUTSCHEN REICHS art. 163 (Weimar Republic, 1919) (“Every German shall have the opportunity to earn his living by economic labor. So long as suitable employment can not be provided for him, his maintenance will be provided for.”); CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 344, Dec. 10, 1931, art. 9, ¶ 2, art. 30, ¶ 1(b),(c), arts. 30–53 (Spain).

27. *See, e.g.*, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 867 (1986) (arguing that the state “owed all citizens . . . nourishment, suitable clothing, and the opportunity for a healthy life”) (quoting BARON DE MONTESQUIEU, *ESPIRIT DES LOIS* 2 (1898)). Indeed, by 1791, the French Constitution imposed a duty on government to “furnish work to the able-bodied poor who cannot obtain it for themselves.” *Id.* (citing 1791 CONST. tit. Ier. (Fr.)).

offered inadequate protection against injustice and inequality.²⁸ Mere absence of government restraint—freedom associated with civil and political liberties—was considered insufficient as a means for citizens to realize their own ends against government-supported structural impositions beyond their control.²⁹ Positive government action was considered necessary to give substance to equality.³⁰ As a result, nearly every constitution drafted after 1945 granted some constitutional status to socioeconomic rights.³¹

The drafters of international resolutions have frequently created provisions that entrench socioeconomic rights. Indeed, the Universal Declaration of Human Rights (UDHR)³² incorporated both socioeconomic and more traditional political and civil rights. The latter were thereafter moved to a separate document.³³ This separation occurred largely as an outgrowth of the Cold War debate over human rights.³⁴ The former, in

28. The classic, late-eighteenth-century liberal's overarching concern was disproportionate centralization of power. *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 424–25 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (“The [r]eigns of good [p]rinces have been always most dangerous to the [l]iberties of their [p]eople.”). By the end of the next century, concern shifted to the “equal” opportunities to enjoy this liberty. *See, e.g.*, ANATOLE FRANCE, LE LYS ROUGE (THE RED LILY) ch. 7 (1894) (mocking the “majestic equality of the law, which forbids the rich as well as the poor to sleep under the bridges, to beg in the streets, and to steal bread”), *quoted in* OXFORD DICTIONARY OF QUOTATIONS 340 (7th ed. 2009).

29. Such “structural impositions” may take a variety of forms. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1336 (2d ed. 1988) (“[A]t least sometimes, the person who is forced to work too hard for too little, or can find no work at all, must be regarded as the victim of the system of contract and property rights rather than the author of his own plight.”).

30. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, THEORY]; JOHN RAWLS, JUSTICE AS FAIRNESS 44 (2001) [hereinafter RAWLS, FAIRNESS] (“Fair equality of opportunity here means liberal equality. To accomplish its aims, certain requirements must be imposed on the basic structure beyond those of the system of natural liberty.”); *see also infra* note 105 and accompanying text.

31. *See, e.g.*, COST. (1947) (Ital.); CONST. OF THE PORTUGUESE REPUBLIC (1976). Some countries include socioeconomic rights as directive principles, rather than explicit guarantees. *See, e.g.*, IR. CONST., 1937, art. 45. The Constitution of South Africa, adopted in 1996, is a useful model of a way to incorporate justiciable socioeconomic rights. This is largely thanks to the relatively rich body of case law from the country's Constitutional Court about how to interpret such rights. *See infra* notes 47–48 and accompanying text (categorizing the intentionally ambiguous wording of the South African Constitution, which guarantees social and economic rights only “within available resources”).

32. G.A. Res. 217A (III), at 71, U.N. Doc A/810 (Dec. 10, 1948).

33. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 172 [hereinafter ICCPR]. The ICCPR sets forth certain human rights principles (such as equal protection under law, freedom of thought, and liberty) and establishes a committee to monitor issues in the states that are parties to the ICCPR. Although the United States has ratified the Covenant, U.S. circuit courts have held that it does not create enforceable obligations because it was ratified with the understanding that it is not self-executing. *See, e.g.*, Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001).

34. In a sense, the Soviet Bloc believed that economic and social rights were antecedent to civil and political freedoms (and could defend their human rights record by pointing to the positive rights that their system provides), whereas the United States believed that economic and social rights

turn, was also enunciated in a separate document—the International Covenant on Economic, Social, and Cultural Rights (ICESCR)³⁵—which committed state parties to work toward granting economic, social, and cultural rights. Though signed by the United States, the Senate has never agreed to ratify it.³⁶ This abstention, however, does not mean the U.S. is alone in leaving socioeconomic rights unrecognized.³⁷ Even in countries bound as state parties to the ICESCR, the failure of such rights to gain traction reflects an important reality: absent effective means of enforcement and a basis in popular legitimacy,³⁸ the enactment of socioeconomic rights remains futile.³⁹

came at the expense of individual freedom (and so could continue to privilege freedom of contract and protection of private property over notions of collective responsibility). *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK 17 (1991).

35. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966).

36. While the ICESCR is not legally binding, the Supreme Court is nonetheless bound to determine whether a particular practice has become customary international law or a general principle of law, even with respect to socioeconomic rights. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”); *see also Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (citing “overwhelming weight of international opinion” and noting that practices in other countries provide confirmation of the Court’s conclusions); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (citing *The International Convention on the Elimination of All Forms of Racial Discrimination* and noting that the Court’s decision was consistent with the international understanding of affirmative action).

37. *See, e.g.*, Ran Hirschl, *The “Design Sciences” and Constitutional “Success,”* 87 TEX. L. REV. 1339, 1361 (2009) (“Although theoretically the formal constitutional protection of positive social rights is supposed to advance their actual status, there appears to be no simple correlation between constitutional status and de facto protection of such rights.”).

38. Opponents of transnational progressivism are keen to attack this point. *See* Ilya Shapiro, Presentation at Washington University in St. Louis School of Law (Nov. 17, 2009) (“[T]here are serious problems with giving the name ‘law’ to institutions that are not rooted in any democratic legitimacy.”).

39. *See, e.g.*, Bas de Gaay Fortman, *Laborious Law* (Human Rights Working Papers, Paper No. 15, 2001), available at <http://www.du.edu/korbel/hrhw/workingpapers/1999-2001/15-degayfortman-09-01.pdf>. Fortman distinguishes declared rights from those that are acquired through societal recognition and finds the former to have led to raised, unfulfilled expectations. *Id.* at 3. He calls for less focus on standard setting and greater emphasis on the local cultural, political, and economic context in which the rights will take shape. *Id.* at 7. Commentators call for a similar focus with respect to the implementation of socioeconomic rights in the U.S. *See* William E. Forbath, *Social and Economic Rights: A Brief Guide to the Constitution of Work and Livelihoods*, 11 J. LAB. & SOC’Y, 145, 154 (2008) (promoting “[p]ublic debate, movement politics, and policy discourse” as the means to renew government’s socioeconomic commitments).

C. Why Socioeconomic Rights Are Considered Important

Drafters embed socioeconomic rights in constitutions for various reasons.⁴⁰ Generally, modern constitutions are *aspirational* (or *transformative*); that is, declarative of an institutional value system that expresses the nation's "deepest hopes and highest aspirations."⁴¹ In contrast, many older constitutions are *preservative*; that is, intended to maintain existing practices and ensure that society does not regress.⁴² The U.S. Constitution shares both aspirational and preservative characteristics.⁴³ Articles I through VI provide the institutional structures governing the political community, while the First through Tenth and Thirteenth through Fifteenth Amendments⁴⁴ provide individual rights thought necessary to protect the individual against intrusion via the government's power.⁴⁵

40. See Mark Tushnet, *supra* note 13, at 1913. Tushnet points to the necessary accommodation in the constitutional drafting process of politically powerful social democratic parties, including those emphasizing social justice, as responsible for the inclusion of social welfare rights. *Id.* Though nearly all contemporary constitutions are ratified by popular referenda, the final version of the South African Constitution was reviewed by the newly created Constitutional Court. See Richard J. Goldstone, *A South African Perspective on Social and Economic Rights*, 13 HUM. RTS. BRIEF 4 (2006). For a discussion of the implications of this arrangement on the justiciability of socioeconomic rights, see *infra* note 67.

41. Robertson, *supra* note 24, at 279 (distinguishing "value-impregnated document[s] representing a society's core values" from documents primarily concerned with "formal delineation of authority and power relationships").

42. See SUNSTEIN, *supra* note 5, at 216–17. "Preservative" constitutions are further described as "macro tables of organization" with "discrete and freestanding prohibitions of certain government activities." Robertson, *supra* note 24, at 279. All constitutions—modern, ancient, transformative, or preservative—also create basic political structures.

43. See, e.g., FORREST McDONALD, *NOVUS ORDO SECLORUM* 261 (1985) ("In the truest sense of the terms, the reformation of the Constitution was simultaneously a conservative and a radical act."); SUNSTEIN, *supra* note 5, at 217 (describing the Due Process Clause as intended to ensure noninterference with rights long understood in Anglo-American traditions, in contrast with the forward-looking Equal Protection Clause intended to prevent future discrimination). Put differently, the Framers were preeminently concerned with the special role of the checks-and-balances system in ensuring deliberative democracy, see Cass Sunstein, *The Enlarged Republic—Then and Now*, N.Y. REV. BOOKS, Mar. 26, 2009, available at <http://www.nybooks.com/articles/22453>, but left room for the Court to interpret certain constitutional language as intended to preserve "core values." See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970) (using a finding that "the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders" to suggest that welfare entitlements be regarded as property).

44. For specific discussion of the argument that the Fourteenth Amendment was itself a transformative document, see *infra* notes 115, 116 and accompanying text.

45. That is not to say that such rights were *necessarily* thought to be necessary. Although the Framers saw federalism as an effective means to keep overzealous government at bay, by "split[ting] the atom of sovereignty" in such a way they also created (perhaps unwittingly) a political structure particularly conducive to the efficient operation (and expansion) of government. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., dissenting). Moreover, it may be argued that

Modern constitutions often share an additional characteristic: *justice seeking*. This principle directs legislators to work to establish justice and orients judicial interpretation toward the same.⁴⁶ For example, in South Africa—where legally enforceable socioeconomic rights are explicit in the constitution—rights jurisprudence is based on the concept of human dignity.⁴⁷ In this sense, a socioeconomic right may be “empowering in that it affirms the inherent dignity of rights-bearers and awards political legitimacy to their demands for the satisfaction of their, otherwise overlooked, material needs.”⁴⁸

The legitimacy of all constitutions, regardless of their founding principles, depends on the proper calculus of rules and principles respecting the individual with a political structure that maximizes democratic principles.⁴⁹ Modern constitutions ground socioeconomic rights in the fundamental values their framers express. The relative importance assigned to such rights—and the role they play within a particular constitutional design—depends on the context in which such

the Bill of Rights itself was meant to privilege popular majorities. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS*, at xii (1998) (“The genius of the Bill was not to downplay organizational structure but to deploy it, not to impede popular majorities but to empower them.”).

46. See Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410 (1993) [hereinafter Sager, *Plain Clothes*]. Sager advocates understanding the Constitution to include “some normative premises, albeit judicially unenforceable, that are categorical, non-negotiable, and demanding of priority.” Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 FORDHAM L. REV. 1989, 1995 (2001) [hereinafter Sager, *Good Society*].

47. S. AFR. CONST., 1996 § 1(a). The inclusive list of founding values is “human dignity, the achievement of equality and the advancement of human rights and freedoms.” *Id.* The second aspiration, to achieve equality, is of particular importance in a country like South Africa, where an extraordinary degree of measurable inequality persists. See, e.g., U.N. ECON. & SOC. COUNCIL [ECOSOC], U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2009, tbl.m, 195–98 (2009), available at http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf. The Gini index quantifies income distribution on a scale of zero to 100, from absolute equality to absolute inequality. *Id.* at 210. Despite its modern infrastructure and the world’s seventeenth-largest stock exchange, South Africa’s Gini value of 57.8 ranks its distribution of income among the most unequal in the world. *Id.* at 195–98; see also U.S. CENTRAL INTELLIGENCE AGENCY, *THE CIA WORLD FACTBOOK* 2008, at 598–99 (2008); Simon Mundy, *S. African Strikers Set to Defy Court Order*, FIN. TIMES, Aug. 22, 2010, available at <http://www.ft.com/cms/s/0/385a8e84-ae11-11d1-bb55-00144feabdc0.html?ftcamp=rss> (“[Public sector trade] unions argue that above-inflation [wage and housing allowance] increases are vital to tackling income inequality.”); Bess Nkabinde, *The Right to Strike, an Essential Component of Workplace Democracy: Its Scope and Global Economy*, 24 MD. J. INT’L L. 270 (2009).

48. Marius Pieterse, *Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUM. RTS. Q. 796, 797 (2007). Pieterse cautions, however, that “the transformative potential of rights is significantly thwarted by the fact that they are typically formulated, interpreted, and enforced by institutions that are embedded in the political, social, and economic status quo.” *Id.*

49. See, e.g., James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy*, 65 MOD. L. REV. 204, 205–06 (2002) [hereinafter Tully, *Unfreedom*].

rights arise. Furthermore, the inclusion of such rights need not be morally based.⁵⁰ Socioeconomic rights may also be entrenched and invoked to give substance to “formal” notions of equality,⁵¹ remedy past discrimination, facilitate the exercise of other rights,⁵² redistribute wealth,⁵³ grant greater access to the political process,⁵⁴ or correct imbalances in power propagated by the existing (and government-supported) regime of contract and property rights. These justifications raise two questions relevant to their future in the United States: (1) As a general matter, of what value is constitutional (and not legislatively driven) recognition of socioeconomic rights, particularly in the face of considerable institutional difficulty? (2) What are the contextual circumstances in America that socioeconomic rights would be called to address? The first question implicates antecedent concerns of whether socioeconomic rights are even justiciable. I will thus address justiciability before turning to each question specifically.

II. CONSTITUTIONALIZATION THROUGH THE COURTS

A. *Problems of Justiciability*

There are compelling arguments that courts should not be involved in the business of recognizing, adjudicating, or creating socioeconomic rights in the first place.⁵⁵ Judicial restraint is generally defended for two reasons:

50. Though normative views of morality may be found in association with nearly all individual rights, a moral claim alone cannot sustain the existence of a right, socioeconomic or otherwise. *See infra* notes 83–87 and accompanying text.

51. *See infra* Part III.B.

52. *See infra* note 114 and accompanying text.

53. *See infra* note 97 and accompanying text.

54. *See infra* note 98 and accompanying text.

55. Extensive debate exists on this topic and more generally on the proper role of an independent judiciary in a constitutional democracy. This Note does not address the appropriateness or the inappropriateness of judicial review of socioeconomic rights. Some scholars caution against judicial review of *any* rights, fundamental or otherwise. *E.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (arguing that, in the face of inevitable disagreement about fundamental rights, decisions regarding their content and existence are best left to majoritarian institutions). This may be a self-fulfilling prophecy in that the very perception of nonjusticiability can prevent the normative development of socioeconomic rights that would otherwise occur through adjudication. *See, e.g.*, David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT'L L. 53, 55 (2006) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989)) (“[I]t ‘is indeed the essence of the judicial craft’ to give ‘some precise, principled content’ to ‘even the most vague and general text.’”). Nevertheless, judicial enforceability in many ways remains the *sine qua non* for a right to reach constitutional status. *See, e.g.*, Alexander, *supra* note 10, at 24 (blaming perceived legal unenforceability for Congress’s failure to adopt the Equal Rights Amendment and actual legal unenforceability for Congress’s repeal of the Eighteenth Amendment). As Alexander succinctly puts it: “[a] statute that doesn’t *do* something is tolerable; a comparable constitutional right is not.” *Id.*

skepticism about the existence of moral rights, and deference to democratic political institutions.⁵⁶ This tracks the argument against judicial enforcement of socioeconomic rights: in adjudicating rights, courts displace legislative judgment on social policy and make decisions with large budget obligations.⁵⁷ Such displacement may put the court into “an impossible managerial position.”⁵⁸ Put generally, the fundamental concern is over proper separation of powers. It offends notions of democratic representation for a handful of individuals to measure citizens’ normative values as a means to adjudicate that for which others must pay.⁵⁹

Even if courts were tasked with enforcement of socioeconomic rights, the possibility that they lack the institutional capacity⁶⁰ necessary to do the job remains a concern. One practical difficulty is that individual complainants are unsuited to argue an alleged deprivation of rights as the result of some larger social problem.⁶¹ This difficulty is compounded by the fact that society’s most disadvantaged and marginalized—those likely to have the strongest claims—lack the ability and resources to get inside the courthouse in the first place.⁶² Furthermore, it is difficult for a court to

56. See, e.g., DWORKIN, *supra* note 13, at 137–38. The skeptical theory holds that individuals hold only legal rights (and not moral rights) granted by the Constitution. *Id.* at 138. The theory of judicial deference, on the other hand, recognizes moral rights but holds the executive and legislative branches better suited to give content to such rights. *Id.* The latter theory resembles what is often called “weak-form judicial review.” See *infra* notes 71–73 and accompanying text.

57. Tushnet, *supra* note 13, at 1896–97.

58. Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. 123, 126 (2001) (noting, as an example, that a state providing insufficient help to those who need housing may be doing so because it has chosen to concentrate on public health or some other social welfare program). Sunstein warns that a court’s displacement of legislative judgment on social policy may “discredit the constitutional enterprise as a whole.” *Id.*

59. Countermajoritarian concerns are closely related to those about separation of powers, and both are subjects of voluminous commentary. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986). For discussion of the unsuitability of the moral existence of basic rights depending solely on majoritarian approval, see *infra* notes 81–82 and accompanying text. See also *infra* Part III.A.

60. Institutional capacity means the ability to gather the relevant information, make appropriate value judgments, and decide the substance of each right. Sunstein, *supra* note 58, at 126. Of course, enforcement of civil and political rights entails a very similar process. The only difference would seem to lie in the inherent nature of the right in question. Some argue that the enforcement of civil and political rights can itself implicate “second-generation” rights. E.g., Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT’L L.J. 763 (2003). It is worth noting that drafters of international charters of rights initially included civil and political rights within the same section as socioeconomic rights. For discussion of the political circumstances surrounding the eventual division into separate documents, see *supra* note 34 and accompanying text.

61. One commentator terms this the “plaintiff problem.” Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 350–51 (2007) (recognizing the “interrelated and reinforcing” concerns about the procedural limitations of judicial enforcement of socioeconomic rights).

62. Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic*

efficiently address larger social problems when its only available remedy is directed to the specific context in which an individual complainant's grievance arose.⁶³

It is clear that obstacles exist to efficiently adjudicate socioeconomic claims in courts. It is also clear that deciding when and how to protect rights involves balancing normative and practical considerations to arrive at a decision that not only addresses the complainant's grievance, but also does so in accordance with constitutionally articulated principles.⁶⁴ We

Rights in National Law, 22 AM. U. INT'L L. REV. 35, 56 (2006). Wiles notes, however, that "[s]imilar criticisms . . . were leveled at civil and political rights before their jurisprudential development through practice and scholarship." *Id.* at 53. That an individual complainant may be impoverished and unsophisticated does not foreclose the possibility that a court may find a broad, affirmative obligation on the part of government to provide a good or a service. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that in state criminal cases, the Sixth Amendment requires the state to provide an attorney for defendants who cannot afford their own counsel). The complainant in the case, Clarence Earl Gideon, wrote his appeal in pencil and paper while in prison. James Taranto, Editorial, *Our 'Constitutional Moment,'* WALL ST. J., Nov. 13, 2009, at A13. Though Gideon's success was in no small part due to the talent of his Court-appointed attorney (Abe Fortas, who joined the Court himself two years later), his case represents the possibility of "[o]rdinary people asking simple questions" about the Constitution that can "affect[] the country in enormous ways." *Id.*

63. Christiansen terms this the "remedy problem." Christiansen, *supra* note 61, at 349. *But see* Tushnet, *supra* note 13, at 1895–97 (cautioning against conflating all rights with remedies). A South African case involving the positive right to housing serves as an example of another type of "plaintiff problem"—one where the court's order provides no relief to the plaintiff who brought suit in the first place. In *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) at 1209 (S. Afr.), the Constitutional Court found the government's housing development program constitutionally flawed because it failed to accommodate people who needed immediate, temporary shelter. The court ordered the implementation of adequate housing for those in "desperate need," but rejected any individual right to housing on demand. *Id.* at 1198. Eight years later, Irene Grootboom died, still waiting for her temporary shelter. *See* Pearlie Joubert, *Grootboom Dies Homeless and Penniless*, MAIL & GUARDIAN, Aug. 8, 2008, <http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>.

64. For an example of the complexity and difficulty associated with the Court's decision-making process in the context of determining the positive obligations of government to its citizens, see *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (holding that the Due Process Clause protects against state action only, and the state cannot be found liable for failure to protect an individual from a private actor). The facts of the case are particularly disturbing: Randy DeShaney repeatedly beat his son Joshua, to the point that the boy "suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded." *Id.* at 193. State social services were notified of the abuse, but did not remove Joshua from his father's custody. *Id.* As a legal matter, Chief Justice Rehnquist—though calling the circumstances "undeniably tragic"—emphasized the Framers' intent to leave state assurance of certain levels of minimum safety and security to democratic political processes. *Id.* at 191, 196 ("[The Due Process Clause's] purpose was to protect the people from the State, not to ensure that the State protected them from each other."). Rehnquist dismissed the argument that, though the state had no part in creating the danger, it had a duty to provide adequate protective services arising from the "special relationship" created by the circumstances of the case. *Id.* at 200 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."). The contention that the state owes a "special," affirmative duty to those whose predicament is a result of past government

assume, in a democratic society, that determinations about what rights are “fundamental” (thus requiring compelling government reasons to support abridgment) ought to be left to democratic political processes, which, in most cases, reflect the will of the majority.⁶⁵ That said, a convincing argument can be made that the majority—aided by (1) structural impositions created and supported by the government, and (2) incomplete and occasionally arbitrary conceptions of the content of fundamental rights—cannot and will not make decisions necessary to substantively facilitate individuals’ realization of their existing constitutional rights.⁶⁶ In such situations, the only recourse of an individual who lacks political capital would seem to be in the courts.⁶⁷ Rather than focus on existing structural limitations of the courts, it is useful to consider an alternative model of judicial review, or what Mark Tushnet refers to as “weak-form.”⁶⁸ After introducing this concept, I will show that, even if the

action tracks a key argument for the judicial recognition of socioeconomic rights. *See also* *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

65. Currently, regular federal and state laws provide some measure of socioeconomic protection, particularly in the areas of education and health care. *See, e.g.*, Neuborne, *supra* note 13, at 888. That citizens of each state should be free to decide what level of government-guaranteed subsistence is best coheres to a general belief in the benefits of federalism. As a normative concept, this appears both in the context of socioeconomic rights to advocates of a larger welfare state, *see, e.g., id.*, and in the context of judicial determination of other nonexplicit constitutional rights, *see, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (“One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion.”).

66. “Structural impositions” can take a variety of forms. In the United States, one perceived barrier to an individual’s full realization of his or her fundamental rights is the very conception of rights the Framers chose to adopt at America’s founding. *See, e.g.*, Tribe, *supra* note 29, at 1336 (“[A]t least sometimes, the person who is forced to work too hard for too little, or can find no work at all, must be regarded as the victim of the system of contract and property rights rather than the author of his own plight.”). For a list of the most commonly perceived “structural impositions,” *see supra* text accompanying notes 51–54. Such a list is not necessarily exhaustive. *See* Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1079 (1977) (recognizing “an unarticulated perception that there exist constitutional norms establishing minimal entitlements to certain services”).

67. One model is a forum that places ultimate decision making about fundamental rights in the hands of experienced judges in a specialized constitutional court. *See, e.g.*, Goldstone, *supra* note 40 (describing how the South Africa Constitutional Court has enforced socioeconomic rights while balancing state legislative prerogatives). Goldstone served as a justice on the “specialized” South Africa Constitutional Court. *Id.* at 4. The U.S. model—with the same Court as final arbiter of both regular and constitutional law—is the exception, rather than the rule, among constitutional democracies.

68. MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 23–25 (2008) [hereinafter TUSHNET, *WEAK COURTS*]. It is worth noting that, in an earlier work, Tushnet advocated removal of the entire Constitution from judicial powers of enforcement. *See* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). For characterization of weak-form review in comparison to strong-form review, *see infra* notes 69–73 and accompanying text.

American constitutional framework shifted toward the weak-form model, it would still be inapt for judicial recognition of socioeconomic rights.

B. Weak-Form Judicial Review and Majoritarian Rights

Decisions of the U.S. Supreme Court represent a form of strong judicial review.⁶⁹ When the Court holds a statute unconstitutional, its order has immediate and potentially broad repercussions for public officials and private citizens alike. The Court's decision—reasonable, well-researched, and thoughtfully presented though it may be—can conflict with what a majority of people, in their own reasonable estimation, thinks that the result should be. According to Tushnet, the trouble lies in the (limited) available recourse, namely, to “amend the Constitution, or wait for judges to retire or die.”⁷⁰ By contrast, weak-form judicial review provides a shorter way to respond to decisions reasonably believed to be mistaken.⁷¹ Weak judicial review may take a variety of forms, but it is generally characterized as permitting the court to declare government action unconstitutional. In contrast to strong-form review, it allows officials to develop appropriate remedies over some short but unspecified period of time.⁷² Tushnet finds weak-form review superior to strong-form review for enforcing socioeconomic rights because it better captures reasonable disagreement about the contextual meaning of abstract rights and reduces the tension between courts and elected representatives.⁷³

Enforcing rights, of course, is not necessarily the same as recognizing them. A court generally cannot find government action unconstitutional

69. TUSHNET, *WEAK COURTS*, *supra* note 68, at 22. Put succinctly, under strong judicial review, the judgment of the court may fully displace the judgment of the legislature. Tushnet, *supra* note 13, at 1909. The U.S. Supreme Court has long asserted its interpretive supremacy, reflecting its commitment to strong-form judicial review. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 528–29 (1997) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) (reiterating that the legislature has no power to alter the Court's interpretation of the Constitution).

70. TUSHNET, *WEAK COURTS*, *supra* note 68, at 22.

71. *Id.* at 23. Tushnet stresses the importance of the word “reasonable” in his argument that the Court's interpretations produce internal dissent, which is sufficient to show that more than one “reasonable” outcome exists. *Id.* at 23–24.

72. *Id.* at 24. Of course, ordering delayed remedies is not entirely foreign to the U.S. Supreme Court. *See, e.g.*, *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (ordering desegregation “with all deliberate speed”). Modern “redemptive constitutionalists” see the greater willingness of American courts to order such remedies as an important doctrinal move in promoting equality. Balkin & Siegel, *supra* note 17, at 101–02 (calling for courts to “explain the constitutional principles at stake,” “state the parameters they will use in reviewing the remedy,” and describe “what kinds of reasons and justifications the legislatures must provide”).

73. TUSHNET, *WEAK COURTS*, *supra* note 68, at 227–65. Of course, an overdelayed remedy may at times be as ineffective as no remedy at all. *See supra* note 63.

unless the grounds for doing so are in the Constitution. Before considering the implications of a theoretical reconceptualization of the U.S. process of judicial review as weak form, then, it is first helpful to consider the potential grounds for implementing socioeconomic rights based on the Constitution as is.

Equal protection⁷⁴ and due process claims rarely have persuaded federal judges to derive positive rights from the Constitution. The Supreme Court's sweeping rhetoric⁷⁵ on socioeconomic issues has nonetheless resulted in narrow holdings.⁷⁶ Several ideas exist to explain this, two of which are relevant here: the "settler's society" account and the "thin Constitution" account. Both have broad appeal—though for different reasons—and both fall short of fully capturing why federal courts and legislatures have been unreceptive to socioeconomic rights.

The first account is historical: the United States is a "settlers' society," and, as such, individual autonomy and possessive individualism, rather than social justice or appeals to collective responsibility, "dominate[] legal and political thinking."⁷⁷ The second is based on the notion of "thin" constitutional case law. Socioeconomic rights are present in the text, but are chronically underenforced as a result of ingrained deference to the judgment of legislators.⁷⁸ In essence, absent precedential vocabulary, the Court lacks the appropriate means to express and enforce certain rights.⁷⁹ Once the legislature has initiated action within a particular arena, however,

74. Generally speaking, under equal protection jurisprudence, similar treatment of individuals differently situated passes constitutional muster, whereas different treatment of individuals similarly situated warrants more careful evaluation. *See, e.g.,* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) ("[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.").

75. *E.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) ("Public assistance . . . is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'").

76. *See* Neuborne, *supra* note 13, at 886–90 (cataloging various failed attempts to recognize positive rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment). That is not say the Court has never derived affirmative government obligations from constitutional text. *See, e.g.,* *Gideon v. Wainwright*, 372 U.S. 335 (1963). For discussion of *Gideon*, see *supra* note 62.

77. Fortman, *supra* note 39, at 7.

78. Sager, *Good Society*, *supra* note 46, at 1995. Sager first spelled out the idea of "thin" constitutionalism as a means to explain why the body of case law on certain constitutional issues fell short of the range of political justice questions that could reasonably be implicated by the text. Sager, *Plain Clothes*, *supra* note 46, at 410 (distinguishing the adjudicated Constitution from the full Constitution). Sager advocates a secondary role for the judiciary in implementing socioeconomic rights, behind the legislature.

79. *See* Sager, *Plain Clothes*, *supra* note 46, at 410.

the Court is competent to issue orders and write opinions based on the right in question.⁸⁰

Both the “settler’s society” account and “thin” constitutional theory account offer insight into the American constitutional framework. Under the latter, majoritarian approval alone suffices to justify the existence of a right. This is antithetical to the calculus of government envisaged by the Framers.⁸¹ Under the former, individual autonomy is a higher-order interest, but remains subject to reordering should new constructs come to dominate legal and political thinking (for example, social justice or appeals to collective responsibility). This not only ignores why a hierarchy of interests exists in the first place, but also relies on the assumption that societies evolve in but one direction—becoming more just, becoming more moral, or possessing greater truth.⁸² Subordinating the capacity to determine one’s *own* conception of the good to the majority’s ability to arrive at and impose a collective system of values subverts autonomy and ultimately renders society’s novel moral constructs indefensible. One can’t decide what’s best for all when one lacks the ability to decide what’s best for oneself. Even if the form of judicial review in the U.S. were “weak,” it is no more legitimate for a court to decide when and where the legislative or executive branches have discretion to determine a socioeconomic right’s content than it is for a court to do so itself. As such, successful justification for the judicial recognition of socioeconomic rights cannot be based exclusively on the consent of the governed to judicial or majority values.

80. *Id.*; see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 699 (6th ed. 2009) (noting that “the cases in which the Supreme Court addressed wealth discrimination generally arose within the context of challenges to the denial of access to specific government programs”).

81. See, e.g., THE FEDERALIST NO. 51, at 358–59 (James Madison) (Benjamin F. Wright ed., 2002) (“It is of great importance in a republic . . . to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.”).

82. A quick glance at societal changes wrought by certain political groups in their respective countries over the twentieth century would seemingly suffice to disabuse one here, Dr. Pangloss notwithstanding. See generally RICHARD J. EVANS, THE COMING OF THE THIRD REICH (2003); KANAN MAKIYA, THE REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ (1989) (originally published under the pseudonym Samir Al-Khalil).

III. MORALITY, LIBERTY, AND THE AMERICAN CONSTITUTIONAL FRAMEWORK

A. *Insufficiency of Majoritarian Consent*

Two basic moral assumptions conflict when dealing with socioeconomic obligations on a large scale: the general recognition that we have certain general obligations to assist others, and the understanding that there are limits on what any other person can demand of us as a duty or obligation.⁸³ But this does not mean that moral values may not be embodied in law⁸⁴ or that there is not a strong moral case for helping those who are in need.⁸⁵ The problem arises in the application of such a right. The very nature of a morally valid claim is that its recognition does not depend on persuading those who have the power to recognize the existence of the right.⁸⁶ In other words, the question is whether, absent the existence of government, the right would still be fulfilled.⁸⁷

83. DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIOECONOMIC RIGHTS* 104–05 (2007). Bilchitz argues that the justification for socioeconomic rights is fundamentally the same as that for civil and political rights. *Id.* at 57–65.

84. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007) (“ethical and moral concerns,” in the context of interest in fetal life, represent substantial state interests).

85. Influential conservatives are eager to express agreement on this point. *See, e.g.*, Douglas W. Kmiec, *Young Mr. Rehnquist’s Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827, 1843 (2006) (quoting William Rehnquist: “[T]he indignity and debasement of the human being who is simply unable to find a place for himself in the economic system is so great that it must be conceded that the right to work is a morally valid claim.”); *see also* Edelman, *supra* note 12, at 24 n.93 (quoting RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 319 (1985)) (arguing “that government has very little power to help” those who are in need, though such a view “does not imply . . . there is no moral case for helping”); Edelman, *supra* note 12, at 23–24 (quoting Antonin Scalia, *Scalia Speaks*, WASH. POST, June 22, 1986, at C2) (“The moral precepts of distributive justice . . . surely fall within the broad middle range of moral values that *may* be embodied in law but *need not* be. It is impossible to say . . . that our constitutional traditions mandate the legal imposition of even so basic a precept of distributive justice as providing food to the destitute.”). Furthermore, some commentators *do* advocate for socioeconomic rights based on moral grounds. *See, e.g.*, Barbara Stark, *Theories of Poverty/The Poverty of Theory*, 2009 BYU L. REV. 381, 398 (contending that viewing socioeconomic rights “as moral obligations rather than legal obligations, provides an independent basis for compliance and at the same time supports their underlying norms”).

86. This calls to mind the distinction made between positive and negative rights. *See supra* notes 18–24 and accompanying text. Traditional negative rights serve to limit the coercive power of the state, derived from the Kantian view of liberty based on autonomy. *See Wiles, supra* note 62, at 45.

87. *See, e.g.*, Cross, *supra* note 13, at 866 (arguing that negative rights do not depend on government because, if government does not exist, it cannot “establish a religion, pass a law denying free speech, or deprive its citizens of life, liberty, or property without due process”). The same is not true for the ends that such rights are meant to achieve. *See, e.g.*, Tom G. Palmer, *Liberty Is Liberty*, CATO UNBOUND (Mar. 12, 2010), <http://www.cato-unbound.org/2010/03/12/tom-g-palmer/liberty-is-liberty/> (“Freedom is an inherently social concept, devoid of meaning outside of society . . . Liberty, like generosity and kindness, refers to a relationship among persons . . .”).

Even if collective responsibility dominates legal and political thinking, and even if “thick” constitutional case law exists, human nature prescribes that individuals will pursue their own goals and “determine their own conceptions of the good.”⁸⁸ The fundamental purpose of a “right,” then, remains the same—to facilitate one’s individual pursuits. But this raises an important question: what, if any, are the necessary preconditions for the substantive exercise of rights aimed at achieving one’s goals? On one hand, government may function as a *regulator* of private ordering; on the other, it can serve as a *facilitator* of private ordering.⁸⁹ Ideally, we want to live in a society that facilitates human possibility, but does so without undue coercion. It is from balancing these two goals that the content of socioeconomic rights emerges.

Balancing facilitation and regulation begins with defining the content of each role. Before deciding what exactly it means to “facilitate human possibility,” we must first consider what it means to be “free from coercion.” Traditionally, this has meant the absence of external, governmental restraint.⁹⁰ Such a definition is neat, but incomplete. For one, it does not readily account for restraints that arise from cultural context.⁹¹ Even the strictest negative-rights adherent must accept that the definition of liberty he or she defends depends, to a certain extent, on social recognition.⁹² Assuming that the facilitation of human possibility

88. Robin West, *Rights, Capabilities, and the Good Society*, 69 *FORDHAM L. REV.* 1901, 1902 (2001). This is in accord with “liberal commitments to individual autonomy.” *Id.* (citing MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* (2000); Amartya Sen, *Rights as Goals*, in *EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM AND JUSTICE* 14 (Stephen Guest & Alan Milne eds., 1985) (1985)). This conception is best termed one’s *summum bonum*, “[t]he greatest good,” *BLACK’S LAW DICTIONARY* 1447 (8th ed. 2004). The achievement of this depends, to varying degrees but rarely at the exclusion of the other, on our two familiar freedoms; from arbitrary interference imposed by others (so-called “negative” freedom) and from limitations inherent in one’s self. *See supra* note 18 and accompanying text.

89. The conceptual division of rights emerges here. Government as *facilitator* tracks the negative conception of rights and stands for freedom from coercion; government as *regulator* tracks the positive conception of rights and signifies enabling human possibility. *See* Kmiec, *supra* note 85, at 1842 (describing the two roles of government: (1) “honor[ing] the avoidance of force, but creat[ing] little opportunity” and (2) “magnify[ing] opportunity,” but “increas[ing] the level of coercion on other citizens”).

90. This is the classical, negative conception. *See* LOCKE, *supra* note 28.

91. *See* Kerry Howley et al., *Are Property Rights Enough?*, *REASON* (Oct. 20, 2009), <http://reason.com/archives/2009/10/20/are-property-rights-enough> (arguing, from a libertarian perspective, “for a wider vision of human liberty . . . that acknowledges government is not the only threat to freedom”).

92. *See, e.g., id.* (noting that “[a]bsent friendly social forces, property rights are an impotent abstraction”).

(via socioeconomic rights) at times requires coercion, in what situations are there adequate grounds to interfere with liberty?⁹³

The response turns on the conception of liberty with which one begins. The Declaration of Independence⁹⁴ begins by stating an inalienable right to liberty (along with “life” and the “pursuit of happiness”),⁹⁵ but gives little guidance on how it is safeguarded or the circumstances where intrusion upon it is warranted. The only thing we can perhaps say with some certainty is that liberty is our most important constitutional value,⁹⁶ and that the American conception of liberty may be (and, for historical reasons, likely is) different than that expressed in the founding documents of other nations.⁹⁷ One relatively uncontroversial idea is that liberty

93. Once one tries to assign relative values to different liberties within a normative hierarchy, the complexity of this question emerges. *See, e.g.*, RAWLS, FAIRNESS, *supra* note 30, at 44, 111 (enumerating a list of equal basic liberties “bound to conflict with one another” and subject to limitation “only for the sake of [one another], and never for a greater public good”). For a more direct take, compare William Saletan, *What Reagan Got Wrong*, SLATE, June 6, 2004, <http://www.slate.msn.com/id/2101835> (“Sometimes, you need more government to get more liberty.”), with President Ronald Reagan, *supra* note 2 (“There’s a clear cause and effect here . . . : As government expands, liberty contracts.”).

94. To be clear, neither the Declaration nor Articles of Confederation provide precedent or evince rigid truth. *See, e.g.*, Fed. Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 791 (1982) (O’Connor, J., dissenting) (“The principal defect of the Articles of Confederation, 18th-century writers agreed, was that the new National Government lacked the power to compel individual action. Instead, the central government had to rely upon the cooperation of state legislatures to achieve national goals.”).

95. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). What the Declaration *does* express is that government exists for the benefit of the people and that “all members of a society are entitled to full protection of the law and to the right to participate in public affairs.” AKHIL REED AMAR & LES ADAMS, *THE BILL OF RIGHTS PRIMER* 27 (2002). It is important to note that though the Declaration emphasizes liberty and equal opportunity to *seek* happiness, it contains no guarantee that members of society actually reach it. *See infra* notes 112–19 and accompanying text (making careful distinction between equal opportunities and equal outcomes).

96. *See, e.g.*, Michael Anthony Lawrence, *The Potentially Expansive Reach of McDonald v. Chicago: Enabling the Privileges or Immunities Clause*, 2010 CARDOZO L. REV. DE NOVO 139, 159–60 n.66 (contending that because every constitutional amendment—except the Eighteenth, which was repealed by the Twenty-First—has had the effect of broadening liberty, “the core value for which the people believe the Constitution stands is Liberty”). This is not necessarily true of changes made to state constitutions. *See* James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4 (reporting passage of constitutional amendments banning same-sex marriage in each of the eleven states in which the issue appeared on the ballot). *See generally* Justice Antonin Scalia, Remarks at Woodrow Wilson International Center for Scholars (Mar. 14, 2005), *available at* http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm (“Some people are in favor of the Living Constitution because they think it always leads to greater freedom . . . [and] more and more rights. Why would you think that? It’s a two-way street. And indeed, under the aegis of the Living Constitution, some freedoms have been taken away.”).

97. For example, liberty in the Declaration is affirmed in conjunction with “life” and the “pursuit of happiness,” which has implications for its meaning very different than that of the liberty in the French Constitution, where it is pronounced alongside “*égalité*” and “*fraternité*” (“equality” and “fraternity.”) 1958 CONST. pmbl. In English, equality means equity or fairness, and an equitable

depends on effective democracy.⁹⁸ But even assuming that we can agree on this notion (and accept an insecure reliance on unelected judges to protect democratic values), it seems impossible to arrive at clear and consistent standards on how courts should interpret constitutional rights to apply to certain facts.⁹⁹

Generally speaking, interference with liberty is warranted where liberty itself is threatened.¹⁰⁰ Such a threat may come from the socially destructive fact that many individuals lack basic choice in obtaining means of survival.¹⁰¹ The recognition of socioeconomic rights, then, might be justified on the continued subordination of persons who are unable to meaningfully exercise liberty.¹⁰²

B. U.S. Constitutional Framework: Contextual Circumstances Ripe for Review?

Socioeconomic rights may be entrenched and invoked to give substance to “formal” notions of equality. Formal equality contemplates only those situations where the law treats similarly situated individuals

distribution usually involves some calculation of proportionate efforts. In French, *égalité* more closely means “arithmetical uniformity.” Michael Novak, *Social Justice: Not What You Think It Is*, HERITAGE LECTURES, Dec. 29, 2009, at 2, available at http://s3.amazonaws.com/thf_media/2009/pdf/hl_1138.pdf.

98. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY* 56–57 (2005). Justice Breyer calls for an elaborate cost-benefit analysis and sanctioning judicial intervention with liberty when believed to enhance democratic participation. See also JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) [hereinafter ELY, *DISTRUST*] (advocating for an interpretation of the Constitution that reinforces democratic processes and popular self-government through equal representation in the political process). One problem with the argument for socioeconomic rights based on democratic principles is that even with perfect political processes, a majority may still choose to limit the amount of assistance it provides to those most disadvantaged in society.

99. This, in a way, brings us back to the rather unfulfilling (and, to originalists, unpalatable) view that judicial outcomes depend first and foremost on the circumstances of the particular case. In other words, pragmatism takes precedent to ideology. See *Obama: Aim for Fundamental Change*, DETROIT FREE PRESS, Oct. 3, 2008, <http://www.freep.com/article/20081003/OPINION01/810030434/> (“[W]hen I think about the kinds of judges who are needed today . . . [the desired judges] have to look at what is going on around [them] and not just ignore real life.”); see also *supra* note 4 and accompanying text (illustrating growing agreement that courts should have some role in alleviating social hardship).

100. See, e.g., Richard Epstein, *The “Necessary” History of Property and Liberty*, 6 CHAP. L. REV. 1, 11 (2003) (“[T]he bottom line is that the presumption of liberty can be overcome only in those cases of a socially destructive ‘prisoner’s dilemma’ game or a genuine externality.”).

101. *Id.* Epstein does not believe, however, that market competition is itself an externality pernicious enough to warrant interference with individual liberty. *Id.*

102. As one commentator put it: “[S]ocio-economic rights can therefore be considered ‘component[s] of a commitment to individual freedom’” Wiles, *supra* note 62, at 48 (quoting DAVID FELDMAN, *CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES* 113 (2d ed. 2002)); see also Balkin & Siegel, *supra* note 17, at 99 (“The practical reality of freedom matters as much as its formal possibility.”).

differently.¹⁰³ Similar treatment is not the same as equal treatment if the groups in question are not similarly situated. For example, treating everyone the same may be an effective strategy for disadvantaging certain groups when the differences between groups are relevant.¹⁰⁴ Substantive equality may extend, then, to situations where the law treats differently situated people the same.¹⁰⁵

For descriptive purposes, notions of substantive equality seem more nebulous than those of formal equality. But both remain indistinct until we know what situations are similar and what differences are relevant.¹⁰⁶ Moreover, precisely *what* and *how* substance is to be (legally) applied depend on the conception of (political) justice with which one begins. As between the ideals of liberty and equality,¹⁰⁷ it is generally understood that the great, albeit very rough, divide is between the conservative's political preference for liberty and the liberal's political preference for equality. Insofar as equality naturally tends toward a static condition of society, it is the more disruptive dynamic of liberty that tends to upend, rather than maintain, established order.¹⁰⁸

103. Individuals are similarly situated in the sense that their rights and obligations do not vary with the identity of their holder; the uniform application of law is what makes a legal order objective. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.”).

104. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) (“The consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat.”); *cf. FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY* 86 (1960) (“It is the essence of the demand for equality before the law that people should be treated alike in spite of the fact that they are different.”).

105. In normative terms, justice might require treating unequal persons unequally. This depends not only on identifying the “relevant” differences among rights holders, but also on an inquiry into the identity of the rights *infringer*. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1210 (2010) [hereinafter Rosenkranz, *Subjects*] (“Every constitutional inquiry should begin with a basic question that has been almost universally overlooked. The fundamental question, from which all else follows, is the *who* question: *who has violated the Constitution?*”).

106. H.L.A. HART, *THE CONCEPT OF LAW* 159 (2d ed. 1994) (“[T]hough ‘Treat like cases alike and different cases differently’ is a central element in the idea of justice, it by itself is incomplete . . . until it is established what resemblance and differences are relevant.”); *see also id.* at 155–67.

107. This Note assumes without comment some necessary connection between principles of justice and principles of equality.

108. *E.g., PASCAL BRUCKNER, THE TYRANNY OF GUILT* 38 (Steven Rendall trans., 2010) (“It is the paradox of open societies that they seem to be disordered, unjust . . . whereas other, more oppressive societies seem harmonious . . .”). In Montesquieu’s words: “Where there are no visible conflicts, there is no freedom.” *Id. But see* CHRISTOPHER HITCHENS, *HITCH-22*, at 51 (2010) (“The conventional word that is employed to describe tyranny is ‘systematic.’ The true essence of a dictatorship is in fact not its regularity but its unpredictability and *caprice*; those who live under it must never be able to relax, must never be quite sure if they have followed the rules correctly or not.”).

Even if we can agree upon a definition of equality, we must still decide what role socioeconomic rights play in its achievement. One approach would be to look at what the best off are getting and decide that everyone else should receive the same.¹⁰⁹ A court need only announce that a socioeconomic right exists and define its content as the leveling up just described.¹¹⁰

But just because we say that everyone holds equal rights does not mean that all citizens are equally capable of enjoying their exercise.¹¹¹ Here, then, it is important to distinguish between unequal outcomes and inequality of opportunity.¹¹² The former is an unavoidable result of individual differences and a market economy.¹¹³ The latter may result when the law forbids unequal treatment by burdening or benefiting identifiable groups, but ignores individuals who, through social subordination preserved by the law, cannot exercise basic civil and political rights.¹¹⁴ This is precisely the inequality that the framers of the Fourteenth Amendment sought to correct.¹¹⁵ Proponents of the importance of “substantive” equality contend that the very purpose of the

109. ELY, *DISTRUST*, *supra* note 98, at 24 (“[O]ne can guarantee equality either by thus commanding it, or, fairly well, by pointing to the things one considers important and saying everyone is to get them.”).

110. *Id.* “The Fourteenth Amendment takes both approaches, but the slightest attention to language will indicate that it is the Equal Protection Clause that follows the command of equality strategy, while the Privileges or Immunities Clause proceeds by purporting to extend to everyone a set of entitlements.” *Id.*

111. This recalls Anatole France’s mockery of the law’s “majestic equality,” *supra* note 28, and suggests Rousseau’s censure of politicians who “fail to reflect that . . . the value [of liberty] is known only to those who possess [it].” JEAN-JACQUES ROUSSEAU, *Discourse on the Origin of Inequality*, in *THE SOCIAL CONTRACT, A DISCOURSE ON THE ORIGIN OF INEQUALITY, AND A DISCOURSE ON POLITICAL ECONOMY* 110–11 (G.D.H. Cole trans., 2006).

112. Indeed, statistical evidence shows that Americans care more about economic mobility than limiting stratification of wealth. *See, e.g.*, Ron Haskins, *Getting Ahead in America*, 1 NAT’L AFF. 36, 42 (2008) (“Polls show that . . . [w]hat matters is not how you compare to others, but whether you have a chance to improve your own circumstances.”). That said, data indicates that father-son income correlations in the U.S. are higher than those in every other industrialized nation, implying that Americans enjoy less economic mobility than they might think. *Id.* at 44–45.

113. *See* HAYEK, *supra* note 104, at 87 (“From the fact that people are very different it follows that, if we treat them equally, the result must be inequality in their actual position . . .”).

114. *See* Wiles, *supra* note 62, at 48 (“Without being literate there is not much use for the right to freedom of speech, and without housing there is not much use for a right to privacy.”).

115. AMAR & ADAMS, *supra* note 95, at 259, 268 (contending that the Fourteenth Amendment begins by affirming the rights, freedom, and citizenship of all and that, properly understood, it provides a “dramatically new understanding of liberty”). Not all commentators subscribe to such a dramatic interpretation. *See, e.g.*, Epstein, *supra* note 17 (“The purpose of the initial clause of the 14th Amendment was to put former slaves on par with all other citizens.”); *see also* Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 335 (2005) (contending that, in the context of economic liberties, the Fourteenth Amendment embraces a narrow definition of liberty).

Reconstruction Amendment was *transformative*.¹¹⁶ It may be argued in favor of socioeconomic rights that traditional civil and political rights insufficiently promote equal liberty.¹¹⁷ The Court has made clear that liberty and equality are closely related: protecting civil liberties can promote equality for subordinated groups,¹¹⁸ and protecting personal autonomy can promote civil equality and affirm equal citizenship.¹¹⁹

But the Fourteenth Amendment's Equal Protection and Due Process Clauses have already proven to be inadequate textual vehicles for the recognition of broad socioeconomic rights.¹²⁰ The Due Process Clause applies, as its name suggests, primarily to process. It "place[s] a federal check on how state laws are applied to particular persons."¹²¹ The Equal Protection Clause applies to inconsistent government treatment of like individuals. It "impose[s] a duty on state executive branches to extend the protection of the law on all persons without discrimination."¹²² If the Fourteenth Amendment truly was transformative, then it seems logical that its leading clause¹²³ best supports the recognition of new, judicially

116. See, e.g., Balkin & Siegel, *supra* note 17, at 93–95 (calling the amendment "an act of redemptive constitutionalism . . . fulfill[ing] the greater purposes of the Constitution and the Declaration of Independence"). Balkin and Siegel further contend that "[w]hen the Court protected liberty during the Second Reconstruction, it paid attention to the inequalities of resources and roles that shaped ordinary people's daily lives and their encounters with the law." *Id.* at 99.

117. When discussing "equal liberty," one must again be careful to distinguish equality of opportunity from equality of outcome; liberty and the latter are, in a sense, mutually exclusive. By desiring equality of result, one has interposed to substitute his or her judgment of the proper outcome upon what would otherwise be the result of individual choice (as unpredictable and messy as that might be). Courts do, however, use liberty interests to protect the exercise of individual rights. See *infra* notes 118–21 and accompanying text.

118. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (liberty interests make a sodomy statute unconstitutional despite no fundamental right to engage in homosexual sex).

119. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (the negative right against the criminalization of abortion in some circumstances makes a statute that does so unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the fundamental right to be free of government invading marital privacy makes a statute criminalizing the use of contraceptives unconstitutional).

120. See *supra* notes 74–76 and accompanying text (describing repeated failures to persuade federal judges to derive positive entitlements from existing constitutional text).

121. Randy E. Barnett, *Is the Constitution Libertarian?* 17 (Georgetown Pub. Law Research Paper No. 1432854, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1432854.

122. *Id.*

123. Section 1 of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added). The Due Process and Equal Protection Clauses apply to persons, whereas the Privileges or Immunities Clause applies to citizens. AMAR & ADAMS, *supra* note 95, at 195–218.

enforceable rights. Indeed, commentators of all political persuasions agree that the Privileges or Immunities Clause was written to protect substantive fundamental rights and, in the run-up to *McDonald*, urged restoration to its intended effect.¹²⁴ Though it has long sat in the judicial scrap heap,¹²⁵ and though Justice Alito danced around it in his plurality opinion for the Court in *McDonald*,¹²⁶ the Clause remains the most suitable vehicle for judicial recognition of socioeconomic rights based on existing constitutional text.

IV. PRACTICAL MEANS OF IMPLEMENTING SOCIOECONOMIC RIGHTS

A. *Reinvigorated Privileges or Immunities as a Textual Vehicle*

Section 1 of the Fourteenth Amendment was intended to make the fundamental rights of the Bill of Rights applicable against state governments.¹²⁷ This included both enumerated rights and preexisting, unenumerated “natural” rights.¹²⁸ The Privileges or Immunities Clause was central to this purpose. “Privileges and immunities” are synonymous with

124. *E.g.*, Professors’ Brief, *supra* note 12, at 4. Perhaps the strongest argument against restoration is from considerations of stare decisis. *E.g.*, Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 326 CATO POL’Y ANALYSIS 1, 38 (1998), available at <http://www.cato.org/pubs/pas/pa326.pdf>; cf. Edelman, *supra* note 12, at 2 (noting that “the Court has overruled longstanding doctrines on other occasions”). Edelman directs this comment toward conservative scholars who hope for a return to *Lochner*-era property and contract rights, but he himself contends that “the Roosevelt Court did not go far enough in assuring minimum economic protection for individual citizens.” *Id.* at 1–2.

125. *See, e.g.*, *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (“The Privileges and Immunities Clause has been largely dormant since the *Slaughter-House Cases* restricted its coverage to ‘very limited rights of national citizenship.’”); Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 495 (3d ed. 2006) (“[T]he Supreme Court’s extremely narrow interpretation of the privileges or immunities clause never has been expressly overruled and has precluded the use of that provision to apply to the Bill of Rights.”).

126.

“We see no need to reconsider . . . here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.”

McDonald v. Chicago, 130 S. Ct. 3020, 3030–31 (2010).

127. *See* AMAR & ADAMS, *supra* note 95, at 196. Section 1 was also intended to overturn the Supreme Court’s decision in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). *See supra* note 123 for the relevant text of the amendment. Dissection of the Fourteenth Amendment’s drafters’ more specific intentions is the subject of considerable debate and is beyond the scope of this Note.

128. *See* U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *see also* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) (affirming the existence of fundamental rights not explicitly listed in the text of the Constitution).

“rights and freedoms,”¹²⁹ and it was the abridgment of these core rights and freedoms at the hands of Southern legislatures that the Amendment’s Framers sought to combat.¹³⁰

Unfortunately, the Court’s first interpretation of the Fourteenth Amendment dramatically reduced the scope of the Privileges or Immunities Clause, holding it to apply only to those rights purely associated with federal citizenship.¹³¹ As a result of this judicial misstep,¹³² subsequent incorporation of fundamental rights against states proceeded through the Due Process Clause, even though its very terms, concern for *process*, render it textually inapposite for the recognition of substantive rights.¹³³ Moreover, because due process is phrased as a negative right, it is particularly unsuited for harvesting positive socioeconomic rights.¹³⁴

The Privileges or Immunities Clause, on the other hand, affords a more suitable path. The text of the Clause plainly refers to unspecified substantive rights against government.¹³⁵ Though the Court in *McDonald* used the Due Process Clause to protect a fundamental right from governmental intrusion,¹³⁶ its result relied on the vote of a Justice whose

129. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1221 (1992) (citing MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 64–65 (1986)) (“[The] words *rights*, *liberties*, *privileges*, and *immunities*, seem to have been used interchangeably.”). To be clear, though these terms correspond in the context of the Fourteenth Amendment, it is possible to make distinctions among them in other situations. See, e.g., Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–58 (1913) [hereinafter Hohfeld, *Fundamental Conceptions*] (classifying legal relations under two categories: jural correlatives and jural opposites). The relevance of Hohfeld’s scheme to the instant discussion is discussed below.

130. AMAR & ADAMS, *supra* note 95, at 194, 199.

131. *The Slaughter-House Cases*, 83 U.S. 36 (1872).

132. See Shapiro & Blackman, *supra* note 17, at 16 (“Virtually no serious modern scholar—left, right, and center—thinks that [*Slaughter-House*] is a plausible reading of the [Fourteenth] Amendment.”).

133. See, e.g., Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 203 (2009) (“Many of the problems related to incorporating federal rights against the states are due to the chaos that the judiciary has created with the Due Process Clause . . .”).

134. See Currie, *supra* note 27, at 865 (noting that the prohibition of states “to ‘deprive’ people of certain things . . . suggests aggressive state activity, not mere failure to help”). This Note does not address the impact that a potentially revitalized Privileges or Immunities Clause would have on existing substantive due process doctrine. For one commentator’s analysis, see Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115 (2010).

135. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 317 (2007); see also ELY, *DISTRUST*, *supra* note 98, at 25 (“[The Privileges or Immunities Clause] seems to announce rather plainly that there is a set of entitlements that no state is to take away (at least not from a United States citizen).”).

136. At issue was the Second Amendment right to keep and bear arms for lawful purposes, specifically the personal right to possess a handgun in the home for self-defense. *McDonald v. Chicago*, 130 S. Ct. 3020, 3044 (2010). Because it found this right to be “among those fundamental

separate opinion rejected the plurality's textual means and depended on a logical interpretation of the Privileges or Immunities Clause.¹³⁷

Thus, an interpretive door was opened.¹³⁸ Future judges, consistent with *McDonald* and faithful to text and principle,¹³⁹ might properly find other rights and liberties and hold them to apply against government. A court need not force the "discovery" of a substantive right in the Due Process Clause. A litigant need only establish that the protection she seeks is a privilege or immunity of citizenship.

The possibility of using a revitalized Privileges or Immunities Clause as a source for socioeconomic rights depends on the ability to locate these rights among the privileges and immunities of national citizenship. On its face, this is an easier task than attempting to shoehorn new individual rights into existing substantive due process doctrine. The range of preexisting unenumerated rights is surely broader than those "of the very essence of a scheme of ordered liberty"¹⁴⁰ or those "objectively, deeply rooted in this Nation's history and tradition."¹⁴¹

The Court has given some guidance on what privileges and immunities are—most notably Justice Washington's laundry list in *Corfield v. Coryell*, written forty-five years before the Fourteenth Amendment.¹⁴² These privileges included "the right to pursue and obtain happiness and safety" and other rights "manifestly calculated . . . [to] better secure and perpetuate mutual friendship and intercourse among the people"¹⁴³—guarantees that certainly seem broad enough to accommodate new substantive socioeconomic rights.¹⁴⁴

rights necessary to our system of ordered liberty," the Court held that states, too, are bound by the protections afforded by the Second Amendment. *Id.* at 3042, 3050.

137. *Id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment) ("I agree with that description of the right. But I cannot agree that it is enforceable against the States through a clause that speaks only to 'process.' Instead, [it] . . . is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.").

138. As one commentator explained: "[T]he fact that there was only a plurality for using the Due Process Clause means that the original meaning of the Privileges or Immunities Clause is now part of constitutional law." Randy Barnett, *The Supreme Court's Gun Showdown*, WALL ST. J., June 29, 2010, at A19 [hereinafter Barnett, *Showdown*].

139. *E.g., id.* "Justice Thomas's uncontradicted analysis will enter into the casebooks from which all law students and future justices study the 14th Amendment." *Id.*

140. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

141. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 719–21 (1997).

142. 6 F. Cas. 546, 551–52 (1823). The Court in *Corfield* was interpreting the meaning of the Privileges and Immunities Clause of Article IV, Section 2.

143. *Id.* at 552.

144. *But see* Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. L.Q. 695, 697 ("Although we do not know precisely what the phrase 'privileges or immunities' meant to the framers, a variety of explanations exist for its open-endedness other than that

Indeed, recognizing socioeconomic rights through a restored Privileges or Immunities Clause arguably befits the “radical reorientation of the American constitutional order” that the framers of the Fourteenth Amendment intended.¹⁴⁵ Given the chance to expand liberty for those unable to enjoy its full and constitutionally guaranteed exercise, it is plausible to foresee judicial sanction of a broad range of positive rights.¹⁴⁶

One possible argument may proceed as follows. A constitution is legitimate only if it balances principles of democracy (popular sovereignty, public autonomy) and principles of constitutionalism (rule of law, private autonomy).¹⁴⁷ One becomes a full citizen not only by having constitutionally announced rights, but also by exercising them.¹⁴⁸ There is a trend reflected in culture¹⁴⁹ and present in all branches of government¹⁵⁰ toward rule in the hands of experts and elites. This runs counter to principles of democracy. The Privileges or Immunities Clause protects a baseline of rights associated with citizenship. Thus, recognition of socioeconomic rights via a revitalized Privileges or Immunities Clause may be justified where such rights increase participation in democratic constitutional institutions, which are threatened by accumulation of decision-making power in the hands of unelected experts.

Hypothetical exercises aside, the constitutionalization of socioeconomic rights via federal courts faces considerable difficulty. America’s cultural and political institutions remain classically liberal. The Supreme Court continues to show preference for measured, careful judgments.¹⁵¹ Legal rights must be clearly defined to have meaning;¹⁵²

the framers intended to delegate to courts the power to make up the privileges or immunities in the clause.”).

145. See Epstein, *supra* note 17; see also Plyler v. Doe, 457 U.S. 202, 218 n.14 (1982) (stating that the Fourteenth Amendment was designed to abolish “class or caste treatment” for those “disfavored by virtue of circumstances beyond their control”).

146. One proposed path—post-reinvigorated Privileges or Immunities Clause—is for the Court to expand its First Amendment “reasonable time, place and manner” doctrine and adopt a “presumption-of-liberty” standard of review when reviewing state actions that affect liberty interests. See Lawrence, *supra* note 96, at 150–60.

147. See *supra* note 49 and accompanying text.

148. Tully, *Unfreedom*, *supra* note 49, at 210–11.

149. See, e.g., William Voegeli, *The Meaning of the Tea Party*, X CLAREMONT REVIEW OF BOOKS 12, 19 (2010) (“We’ve delegated responsibility for our “core institutions”—public schools and colleges, health care, finance, retirement, government at all levels—to those experts, and all of them ‘cost more than we can pay,’ but ‘don’t do what we need.’”).

150. See, e.g., Lawrence Baum & Neil Devins, *Why the Supreme Court Cares More About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010).

151. That is not to say that Justices are consistent in the importance assigned to precedent in any given case. Compare *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992) (plurality opinion)

ambiguities must be acknowledged and addressed to make good sense of the parties and issues at stake.¹⁵³ But the Court, not Congress, is best positioned to identify what those rights are.¹⁵⁴ In *McDonald*, the Court pressed to know what unenumerated rights constitute privileges or immunities such that a revitalization of the eponymous clause might lead to their vindication.¹⁵⁵ Though the plurality's opinion left this question unanswered, the tracks have been laid to return to it in the future.¹⁵⁶ There certainly exists mounting public acceptance of an increased role of government in citizens' lives.¹⁵⁷ People are subject to a dizzying number of laws, whether they like it or not.¹⁵⁸ Citizens certainly see value in government actions that address immediate problems.¹⁵⁹ But just what

("Liberty finds no refuge in a jurisprudence of doubt."), with *id.* at 993 (Scalia, J., dissenting) ("Reason finds no refuge in this jurisprudence of confusion.").

152. See generally Hohfeld, *Fundamental Conceptions*, *supra* note 129.

153. This is an ongoing process, even with rights explicitly guaranteed. See generally Rosenkranz, *Subjects*, *supra* note 105. One difficulty with making good sense of the Privileges or Immunities Clause is that it lacks an explicit subject.

154. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'").

155. Transcript of Oral Argument at 8, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) ("Justice Ginsburg: . . . What does the privileges and immunities of United States citizenship embrace?"); *id.* at 4 ("Justice Sotomayor: What [injustice]. . . has been caused by [not incorporating the Privileges or Immunities Clause] that we have to remedy . . . ?"); *id.* at 63 ("Justice Kennedy: . . . [W]hat are these other unenumerated rights?").

156. See Barnett, *Showdown*, *supra* note 138 ("[T]here is no longer a majority of the court willing to use the Due Process Clause in a case in which the Privileges or Immunities Clause is the right clause on which to rest its decision.").

157. To give but a few recent examples of such intervention, direct and indirect: increased regulation of the practices of financial institutions, public stakes in banks and automakers, and expansion in the provision of health care. This is a trend in wealthy and developing alike. See, e.g., *Picking Winners, Saving Losers; The Global Revival of Industrial Policy*, *ECONOMIST*, Aug. 7, 2010 (ascribing this strategy in part to pressure on governments to reduce unemployment, stimulate growth, and rebalance economics).

158. See Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE* 43–56 (Timothy Lynch ed., 2009).

159. Polls show that a significant majority of Americans believe reducing unemployment to be a more important goal of the government than reducing the deficit. E.g., Press Release, Quinnipiac Univ. Polling Inst., U.S. Voters Split on Obama, Down on Everyone Else, Quinnipiac University Poll Finds; But President's Job Push Gets Strong Support (Feb. 11, 2010), available at <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1423> (reporting 71% belief in the above and 72% support for 100 billion dollar federal expenditure to create jobs). Given that unemployment surpassed 10% in 2009, these results are of little surprise. See generally Don Peck, *How a New Jobless Era Will Transform America*, *ATLANTIC MONTHLY*, Mar. 2010, available at <http://www.theatlantic.com/doc/print/201003/jobless-america-future>.

kind of “shepherd” we want remains to be seen.¹⁶⁰ Government cannot guarantee jobs for everyone. Even if a constitutional “right to gainful employment” exists, it’s unclear what sort of employment that would be.¹⁶¹ Moreover, as legal rights of nonstate actors continue to expand¹⁶² and transnational enterprises take greater responsibility for the observance of international norms in human rights,¹⁶³ judicial oversight of the interaction among states, citizens, and multinational corporations seems increasingly necessary. The concerns underlying these views are precisely what positive socioeconomic rights are intended to address. Stay tuned.

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160. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 805–06 (Isaac Kramnick ed., Gerald Bevan trans., Penguin Classics 2003) (1835, 1840) (“[T]he ruling power . . . cover[s] the surface of social life with a network of petty, complicated, detailed, and uniform rules . . . It does not break men’s wills but it does soften, bend, and control them . . . reduc[ing] each nation to nothing more than a flock of timid and hardworking animals with the government as shepherd.”).

161. One large employment agency reports that finding skilled labor ranks first among American employers’ hiring challenges and recommends a “societal mindshift that brings honor back to” tradespeople like butchers, mechanics, and electricians. Manpower, Inc., *Strategic Migration—A Short-Term Solution to the Skilled Trades Shortage*, WORLD OF WORK INSIGHT, Aug. 2010, at 2–3, available at <http://www.manpower.com/research/research.cfm> (using data from its 2010 *Talent Shortage Survey*).

162. Corporations have long been afforded many core constitutional rights, the exercise of which the Supreme Court has recently strengthened. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (invalidating on First Amendment grounds a federal statute limiting corporate political expenditures).

163. See Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, S.C. Res. 2003/16, ¶ 1, U.N. Doc. S/RES/2003/12 (Aug. 26, 2003) (“Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights.”); Interview by Richard Dion with John Ruggie, Special Representative of the U.N. Sec’y Gen. on Issues of Bus. & Human Rights (May 7, 2009), available at http://www.shell.com/home/content/responsible_energy/shell_world_stories/2009/john_ruggie/ (“The state has the primary duty in relation to human rights, and for most social and economic rights its duty is subject to ‘progressive realisation’. . . . [Business] ought to do its best to contribute to the realisation of rights.”).

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